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No. 214

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Supreme Court of the United States

OCTOBER TERM, 1965

HOME NEWS PUBLISHING COMPANY, INC., and JAY MORTON,

Petitioners,

versus

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

TO THE HONORABLE EARL C. WARREN, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The Petitioners, HOME NEWS PUBLISHING COMPANY, INC. and JAY MORTON, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on February 2, 1965.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit dated February 2, 1965 [R. 17] is reported at 341 F.2d 20, and for the convenience of the Court it is reproduced as Appendix A *infra*, p. App. 1.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was made and entered on February 2, 1965. [R. 17].

On March 5, 1965, the United States Court of Appeals for the Fifth Circuit denied a Petition for Rehearing. [R. 33]. Attached hereto for the convenience of this Court is said Order denying the Petition for Rehearing. [Appendix C, *infra*, p. App. 9].

On March 19, 1965, the Honorable Griffin E. Bell, United States Circuit Judge, entered an Order staying the Mandate of the United States Court of Appeals for the Fifth Circuit for a period of thirty (30) days. Subsequently, the Honorable Griffin B. Bell, United States Circuit Judge, entered orders staying the issuance of the Mandate of the United States Court of Appeals for the Fifth Circuit to and including June 16, 1965, a copy of the last order staying the issuance of the said Mandate is appended to this Petition. [Appendix D, *infra*, p. App. 10]

The Petition is timely filed [63 Stat. 104, 1949, amending 62 Stat. 961—Title 28, U.S.C. Section 2101(f)].

The jurisdiction of this Court is invoked under 62 Stat. 928, 1948—Title 28, U. S. C. 1254(1).

QUESTIONS INVOLVED

1. The Federal Courts have a duty to construe legislative enactments in accordance with statutory language utilized by Congress; and they are precluded from indulg-

ing in speculation to create fictitious situations to be endowed with, through the guise of interpretation, a presumption as to what the statute might be, rather than what it is.

2. This Court has never ruled that the relief afforded under the Fair Labor Standards Act is available to a discharged employee because his discharge resulted from his testifying in a criminal proceedings charging the employer with a criminal violation of the Act. [Fair Labor Standards Act, Section 15(a)(3), 52 Stat. 1068, 1938; 63 Stat. 919 1949; 29 U.S.C. §215(a)(3)].

STATUTE INVOLVED

Section 15(a)(3), Fair Labor Standards Act, [52 Stat. 1068, 1938, as amended; 63 Stat. 919, 1949—29 U.S.C. §215(a)(3)] provides:

> "(a) After the expiration of 120 days from June 25, 1938, it shall be unlawful for any person...
>
> "(3) to discharge or in any other manner discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or cause to be instituted any proceedings under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee; . . ."

STATEMENT

The Respondent filed a complaint alleging that an employee of the Home News Publishing Company, Inc., of which the Petitioner Morton was president, had testified in response to a subpoena as a witness on behalf of the United States in a criminal prosecution charging violation of the Fair Labor Standards Act, and that because of such testimony, the employee was discharged on the day following his appearance as a witness [R. 1].

The complaint sought not only the reinstatement of the employee to his former position but also sought for and on behalf of said employee a reimbursement of wages lost as a result of the discharge [R. 4].

The Petitioners moved to dismiss the complaint on the ground that it failed to state a cause of action upon which relief might be granted, contending that Section 15(a)(3) of the Act [29 U.S.C. §215(a)(3)] did not vest the district court with such jurisdiction [R. 5].

The district court agreed with the Petitioners, dismissing the complaint [R. 11]; and the Respondent appealed [R. 12].

The United States Court of Appeals for the Fifth Circuit (Circuit Judge Bell) reversed; Circuit Judge Jones dissenting [R. 17].

REASONS FOR GRANTING THE WRIT

The question presented by the record is one of first impression in this Court.

This Court has never determined whether or not the Secretary of Labor under the provisions of Section 15(a)(3) of the Fair Labor Standards Act (29 U.S.C. §215(a)(3) hereinafter referred to as the Act, has been given the right to seek remedial relief for and on behalf of an employee who has been discharged for testifying in a criminal proceeding charging violations of the Act.

The Act itself clearly sets forth seven classifications defining an unfair labor practice which if perpetrated by an employer, the respondent is granted the right to seek relief for and on behalf of the aggrieved employee. None of the seven requirements as enumerated in the Act specifically and definitely described as an unfair labor practice the discharge of an employee because of his testimony rendered in a criminal prosecution charging the violation of the Act. [(29 U.S.C. §215(a)(3)].

The majority opinion admits that the classification involved in the instant matter is not provided for in the Act.

It seeks to overcome this deficiency by the finding of the existance of an ambiguity, and then construing the application of judicial interpretation to find the Congressional intent to resolve the ambiguity. However, the opinion fails to recognize the limitations and standards of judicial interpretation of legislation and does in fact misapply and miscontrue this Court's directive.

This Court has held that an ambiguity must be real and not created as an excuse to interpret a statute. The Congressional hearings prior to the enactment of a statute give to the courts the basic insight of the legislative intent of the Congress and it is to those hearings that one must look if in fact there is an ambiguity. The ambiguity cannot be falsely created in order to supplant the Congressional will, as manifested by the enacted legislation. The basic requisite is to determine the policy of the legislation. [*American Federation of Musicians v. Wittstein*, U.S. , 85 S.Ct. 300 at 303, L. Ed. 2d , 1964; *United States v. Max Powell*, U.S. ,85 S. Ct. 248 at 253, L. Ed. 2d , 1964, *Shapiro v. the United States*, 1947, 335 U. S. 1, 31, 68 S. Ct. 1375, 1391, 92 L. Ed. 1787, 1806.]

The opinion below creates an embiguity which does not exist and then fails to follow the required procedures of the investigation into the Congressional intent to resolve it. There is no reference in the Opinion as to the Congressional hearings or reports. Hence, it is only a supplanting by the judiciary of an authority which it does not possess under the Constitution of the United States specifically legislating subsequent to the establishing of an unfounded premise.

The Opinion below fails to recognize that a criminal violation of any statute of the United States is a separate and distinct prosecution under the Federal Criminal Code and is not a prosecution under the Act. The Act in reality defines the crime, the prosecution thereof is then left to the appropriate federal authorities [5 U.S.C. §310, June 30, 1906, c. 3935, 34 Stat. 816, June 25, 1945, c. 646, 62 Stat. 910, May 24, 1949, c. 139 §71, 63 Stat. 100, 28 U.S.C.

§507(a)(1), as Amended, *Deutsch v. Aderhold*, 80 F. 2d 277, CCA Ga.]

In addition to the foregoing, the Opinion fails to heed this Court's declaration that the retaliatory acts available to the Secretary of Labor are restrictive and that Section 15(a)(3) of the Act must be interpreted in a limited and restrictive manner where the Secretary of Labor seeks to enforce remedial actions.

This Court has held in the language of the opinion rendered by Mr. Justice Harlan:

> ". . . By the *proscription* of retaliatory acts set forth in Section 15(a)(3), and its enforcement in equity by the Secretary pursuant to Section 17, Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced." [*Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288 at 292, 80 S. Ct. 332 at 335, 4 L. Ed. 2d 323 (1960), Emphasis ours.]

This condition of limitation upon the Secretary's authority is clear and in fact establishes a basic fact which must be recognized in the application of the Act. If anything it dictates a narrow interpretation rather than a broad inclusion and the Respondent is limited in his undertaking of suits for and on behalf of employees who feel that they have been aggrieved by an unfair labor practice.

When a classification is not enumerated it cannot be included by judicial amendment.

If the foregoing authority is not sufficient, it has long been held that the clause "in any such proceeding" are words of limitation and preclude a broadening of classification contained in such reference. This phase has never been interpreted to mean "in any proceeding". *Electric Power and Light Company*, 210 F. 2d 585, at 590, 2nd Cir., 1954.

It is apparant that the Opinion has failed to interpret the Congressional intent not only within the limitation of the statute but also within this Court's directive.

CONCLUSION

It, therefore, is apparent that this Court should grant the Petition sought herein, inasmuch as the matter presented in one of first impression under the Federal Statute and further, that the opinion below fails to take cognizance of the prescribed and established procedure enunciated by this Court in the application of the doctrine of judicial interpretation of Federal Statutes.

The decision below is at odds with the established procedures that this Court has enunciated in similar matters and therefore should be corrected.

Respectfully submitted,

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APPENDIX A

In The

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

No. 21,358

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor,

Appellant,

versus

HOME NEWS PUBLISHING COMPANY, INC. and JAY MORTON,

Appellees.

Appeal from the United States District Court for the Southern District of Florida

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(February 2, 1965)

Before JONES and BELL, Circuit Judges and HUNTER, District Judge.

BELL, Circuit Judge: Appellant, the Secretary of Labor, sued to enjoin the appellees under § 17 of the Fair Labor Standards Act from violating § 15(a)(3) of the Act. 29 USCA, §§ 217, 215(a)(3). This latter section, in pertinent part, makes it unlawful for any person:

> " . . . to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [this Act], or has testified or is about to testify in any such proceeding, . . ."

The Complaint alleged that an employee of Home News Publishing Company, of which appellee Morton was president, had testified in response to a subpoena as a witness on behalf of the United States in a prosecution charging appellees with criminal violations of the Act,[1] and that because of such testimony the employee was discharged on the day following his appearance as a witness. The prayer was for reinstatement of the employee to his former position, and for reimbursement for wages lost as a result of the discharge.

The defendants moved to dismiss on the ground that the complaint failed to state a cause of action on which relief might be granted. They contended that § 15(a)(3) does not vest the court with jurisdiction in a situation where the discharged employee has been discharged for testifying in a criminal proceeding brought under the provisions of the Act against the employer. This defense was premised on the theory that an employee can neither institute nor cause a criminal matter to be instituted and hence § 15(a)(3) was inapplicable. This result is said to follow from the language of the section having to do with testifying which is modified by the words "in any such proceeding." Thus, it is said, the relief afforded under the section to a discharged employee is limited to

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[1]See *Home News Publishing Company, Inc. v. United States*, 5 Cir., 164, 329 F.2d 191, affirming the judgment of conviction.

those cases where the employee has filed a complaint, or instituted or caused to be instituted a proceeding under the Act, and to an employee who has testified in such a proceeding. The District Court, agreeing with defendants, dismissed the complaint, and this appeal followed.

The Secretary urges that the construction placed on the statute by the District Court was overly literal to the end that the fair intendment of Congress was avoided. We agree and reverse.

The protection of the section specifically runs to an employee who has filed a complaint under the Act, or who has instituted or caused a proceeding to be instituted under the Act. It runs additionally to an employee who has testified or is about to testify "in any such proceeding", i.e., at the least to a proceeding of the type that could have been instituted or caused by him to have been instituted. The question is whether this is the breadth of the protection, or whether it runs to an employee testifying in any proceeding under or relating to the Fair Labor Standards Act.

In *Mitchell v. De Mario Jewelry, Inc.*, 1960, 361 U.S. 288, 80 S.Ct. 332, 4 L.Ed.2d 323, a case involving the power of the court under § 17 to order reimbursement of lost wages where § 15(a) was violated, the court made the following statement with respect to the purposes of the Fair Labor Standards Act generally and § 15(a)(3) specifically:

> "The central aim of the Act was to achieve, in those industries within its scope, certain minimum labor standards. See § 2 of the Act, 52

Stat. 1060, 29 USC § 202. The provisions of the statute affect weekly wage dealings between vast numbers of business establishments and employees. For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances. This end the prohibition of § 15(a)(3) against discharges and other discriminatory practices was designed to serve. For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions. Cf. Holden v. Hardy, 169 US 366, 397, 42 L.Ed. 789, 792, 18 S.Ct. 383. By the proscription of retaliatory acts set forth in § 15(a)(3), and its enforcement in equity by the Secretary pursuant to § 17, Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced."

The fact giving rise to the violations in *Mitchell v. De Mario* was the discharge of employees who sought back wages through a suit by the Secretary. In *Goldberg v. Bama Manufacturing Corporation*, 5 Cir., 1962, 302 F.2d 152, a case involving a discharge for having filed a complaint, we gave effect to the policy of the law as thus expressed in *Mitchell v. De Mario, supra.*

The case of *Mitchell v. Dyess*, S.D.Ala., 1960, 180 F.Supp. 852, involved the application of § 15(a)(3) to protect an employee who testified on behalf of the Secretary in a suit for injunction brought by the Secretary. The facts show that it was not a proceeding instituted or caused to be instituted by the employee. The court stated that the employee was discharged solely because of his appearance as a witness on behalf of the Secretary. The Secretary prevailed in his effort on behalf of the discharged employee. However, there is apparently no existing authority on the precise question presented here, i.e., where the employee has testified in a criminal proceeding brought under the Act, rather than in a proceeding for an injunction.

In making our determination, we begin with the conclusion that the section under consideration, from the standpoint of the question presented, is ambiguous. The pertinent language of the section is " . . . to discharge any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [this Act], or has testified . . . in any such proceeding, . . . " Discrimination against an employee who "has testified or is about to testify in any such proceeding" is prohibited. The ambiguity arises from the words "any such proceeding". The Secretary contends that "any such proceeding" refers simply to "any proceeding under or related to [this Act]". A criminal proceeding instituted by the Secretary is one "under or related to [this Act]"; consequently, the discharge of an employee for testifying in a criminal proceeding is prohibited by § 15(a)(3). The employer, on the other hand, argues that "any such proceeding" refers to any proceeding under the Act which an "employee has

. . . instituted or caused to be instituted." A criminal proceeding is not one which an employee may institute or cause to be instituted; therefore, discrimination against an employee for testifying in a criminal proceeding is beyond the pale of the statute. It is apparent that the words of the section will support either construction.

Construing the language in question on its terms and in the light of the purposes of the Act, we hold that "any such proceeding" as used in the section is modified only by the preceding language "any proceeding under or related to . . . [the Act]." This means then that an employee who testifies in any proceeding under or related to the Act receives the protection of the section, and this includes a criminal proceeding.

We thus resolve the ambiguity in favor of the Secretary, and avoid a result wherein an employee who testifies for the Secretary in a civil action for an injunction, *Mitchell v. Dyess, supra,* or in an action brought on behalf of an employee, *Mitchell v. De Mario Jewelry, supra,* is protected, but one who testifies on behalf of the Secretary in a criminal proceeding brought under the Act is not. This, in our view, carries out the intention of Congress in enacting § 15(a)(3). See *Shapiro v. United States,* 1947, 335 U.S. 1, 31, 68 S.Ct. 1375, 1391, 92 L.Ed. 1787, 1806, for a statement of the rule that in statutory construction we should, where the statute is susceptible of either of two opposing interpretations, read the statute so as to effectuate rather than frustrate the purpose of the Congress. This we have done. The protection of § 15(a)(3) runs to the employee here who testified in the criminal proceeding brought under the Act.

REVERSED and REMANDED for further proceedings not inconsistent herewith.

JONES, Circuit Judge, Dissenting:

It seems to me that the language of the statute is plain, that there is no ambiguity and that the result reached by the majority rewrites the Act of Congress. I

DISSENT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA. MIAMI DIVISION.

No. Civil Action 63-557-Civ-DD

ORDER

Filed December 19, 1963

This matter coming on before the Court upon motion of the defendants to dismiss plaintiff's Complaint, and it appearing to the Court that Section 15(a)(3) of the Fair Labor Standards Act of 1938 as Amended (29 U.S.C. §§ 29 et seq.), hereinafter referred to as the Act, does not provide the Court with jurisdiction in a situation where the discharged employee has been discharged by a defendant for testifying in a criminal proceeding under the provisions of the Act; accordingly the Court having heard argument of counsel and being otherwise sufficiently advised in the premises, it is therefore

ORDERED, that the defendants' Motion to Dismiss is granted, and the plaintiff's Complaint stands dismissed with prejudice, costs taxed against said plaintiff.

DONE and ORDERED, at Miami, Florida, this 17th day of December, 1963.

DAVID W. DYER
United States District Judge

APPENDIX C

In The

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

No. 21,358

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor,

Appellant,

v.

HOME NEWS PUBLISHING COMPANY, INC. and JAY MORTON,

Appellees.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING

(March 5, 1965)

Before JONES and BELL, Circuit Judges, and HUNTER, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is, hereby DENIED.

JONES, Circuit Judge, I dissent.

U.S. Court of Appeals
FILED
March 5, 1965

EDWARD W. WADSWORTH
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

No. 21358

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPT. OF LABOR,

Appellant,

HOME NEWS PUBLISHING COMPANY, INC. AND JAY MORTON,

Appellee.

ON CONSIDERATION OF THE APPLICATION OF the appellant in the above numbered and entitled cause for a further stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is further stayed to and including June 16, 1965, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ GRIFFIN B. BELL
United States Circuit Judge

Dated:

(ORIGINAL FILED MAY 13, 1965)